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No. 71-1117

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA and BRUCE B. MACK,
Revenue Agent, Internal Revenue Service

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JOHN P. BURKE,
JOHN M. BRANT,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 13-20) and of the district court (Pet. 22-27) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1971. A petition for rehearing was

denied on January 17, 1972 (Pet. 21). The petition for a writ of certiorari was filed on March 2, 1972. Jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a taxpayer who invokes the privilege against self-incrimination may be compelled to produce copies of his prior tax returns, where criminal prosecution is only a remote possibility and the copies of the returns actually belong to an accountant and were turned over by the accountant to the taxpayer during a tax investigation for the sole purpose of placing them beyond the reach of the investigation.

2. Whether the prosecution met its burden of proof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment, the relevant part of the Fifth Amendment, and Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), are printed in the Appendix, *infra*, pp. 13-14.

STATEMENT

The government filed a petition (R. 3-5)[1] in the district court pursuant to Sections 7402(b) and 7604 (a) of the Internal Revenue Code of 1954, seeking

[1] "R." refers to the record appendix filed in the court of appeals.

enforcement of an Internal Revenue Service summons issued under Section 7602 of the Code, requiring petitioners to produce copies of petitioners' federal income tax returns for the years 1949 through 1959 (R. 6-7). The district court ordered petitioners to comply with the summons (Pet. 28). The court of appeals affirmed (Pet. 13-20).

The evidence at the hearing on enforcement of the summons established that an Internal Revenue agent, in the course of investigating petitioners' income tax returns for 1960 through 1966, discovered a possibility of fraud, with the result that a special agent of the Intelligence Division of the Internal Revenue Service was also assigned to the case (Pet. 23). The special agent first saw petitioner Richard Widelski on January 31, 1968, and was told that a Mr. Ted Kustryk (described as an "accountant or bookkeeper" (*ibid.*)) had prepared all of petitioners' returns for 1949 through 1959 (*ibid.*). The special agent immediately made an appointment to see Kustryk on February 8, 1968, but the appointment was later rescheduled for February 12, 1968 (*ibid.*). On the latter date Kustryk told the special agent that two days before (on February 10, 1968) he had turned over to petitioners all work papers and copies of income tax returns pertaining to them (Pet. 23-24). Kustryk had kept all these papers continuously in his possession and petitioners had never previously asked for them (Pet. 24). The court found "that these copies were part of Mr. Kustryk's work papers and remain his property" (*ibid.*).

On May 29, 1969, the summons here involved was served on petitioners, requiring them to produce "[t]he accountant's or taxpayer's [sic] retained copies of Federal Income Tax Returns * * * for the years 1949 through 1959 inclusive, which are in your possession or control" (R. 6). Petitioners refused to comply (R. 4), and the enforcement petition was filed on April 9, 1970 (R. 3).

The summons had been issued because the government no longer had copies of the tax returns in question and the information contained in the returns was necessary for a reconstruction of petitioners' net worth, which in turn would shed light on the accuracy of their tax returns for years 1960-1966 (Pet. 25). In January 1969, the Intelligence Division "decided to drop its portion of the case" (Pet. 24).

The district court concluded that to require petitioners to produce Kustryk's copies of their income tax returns would not violate petitioners' Fifth Amendment rights, "since the frantic last minute efforts on their part to put the requested returns beyond the reach of the Government did not have the effect of transferring rightful possession of Mr. Kustryk's records to them" (Pet. 26).

The court of appeals, affirming, held that the district court's finding concerning ownership of the documents in question was not clearly erroneous (Pet. 18) and that "under the facts of this case" the transfer of the documents to petitioners did not permit them to "raise a privilege that would have been denied to them had the documents remained in the hands of the accountant" (Pet. 19).

ARGUMENT

1. Petitioners' main contentions are premised upon an assertion of the privilege against self-incrimination (Pet. 7-8, 10).[2] Although petitioners fail to explicate their underlying reasoning, their assumption apparently is that the privilege applies (a) to the production of copies of previously filed tax returns, where (b) production of the copies is sought for revenue purposes and the possibility of any criminal prosecution is remote, and (c) the copies belong to a third person and were transferred to the taxpayers for the sole purpose of placing them beyond the reach of a continuing tax investigation. Petitioners' argument fails for three independent reasons.

a. The summons here at issue requires production only of copies of petitioners' tax returns for certain prior taxable years, not of personal financial records or other work papers used in preparing the returns. It is well established that there is no constitutional privilege against filing a tax return. *United States* v. *Sullivan*, 274 U.S. 259. Whether or not under some circumstances there may be a privilege to withhold information requested in a return, the Court in *Sullivan* intimated that any such privilege could

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[2] Petitioners claim to rely in part on the Fourth Amendment, see Pet. 10, but that reliance does not appear to be independent of their Fifth Amendment argument. It follows that if the Fifth Amendment self-incrimination argument is without merit, the reliance on the Fourth Amendment is misplaced.

be asserted only at the time of filing. *Id.* at 263-264. Impliedly, failure to assert the privilege upon the return constitutes a waiver of the privilege with respect to the information reported there, at least insofar as the information is sought by the government only to establish the taxpayer's income for the relevant years. Cf. 26 U.S.C. 7213, relating to penalties for unauthorized disclosure of such information. Therefore, an order requiring production of a mere copy of the return in this setting seeks no privileged information and offers no opportunity for a fresh assertion of the privilege.

This analysis is buttressed by the consideration that under *Sullivan* a tax return is a validly required report to the government. Required reports to the government, like "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation" (*Shapiro* v. *United States*, 335 U.S. 1, 33), are quasi-public documents and as such are not subject to an assertion of privilege with respect to the information contained therein. *E.g.*, *Rodgers* v. *United States*, 138 F. 2d 992 (C.A. 6). This is true even when the document is in the possession of the person asserting the privilege. See generally 8 Wigmore, *Evidence* (McNaughton rev. 1961) § 2259c, and Meltzer, *Required Records, the McCarran Act and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 715-719 (1951). A copy of a quasi-public document should be entitled to no higher privilege than its original.

b. This Court has recently held that "[i]n order to invoke the privilege [against self-incrimination] it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California* v. *Byers*, 402 U.S. 424, 429. See also *Marchetti* v. *United States*, 390 U.S. 39, 53. Petitioners do not meet this test. As the court of appeals stated (Pet. 20):

> It is to be emphasized that the District Court in the present case found that the Intelligence Division of the Internal Revenue Service has dropped that portion of the investigation concerned with possible criminal behavior. The case now before us presents an investigation of civil tax liability and perhaps civil fraud penalties. The possibility of any criminal prosecution of the taxpayers would appear to be remote. * * *

This "mere possibility of incrimination" (*Byers*, 402 U.S. at 428) is not a sufficient basis for assertion of the privilege. Indeed, in denying exercise of the privilege in *Byers* the Court noted that the state reporting requirement there was "no more incriminating than the tax return, linked with the disclosure of income, in *United States* v. *Sullivan* * * *." *Id.* at 434. Furthermore, the revenue ends sought to be served here constitute a significant "noncriminal governmental purpose in securing the information * * *." *Id.* at 458 (concurring opinion of Mr. Justice Harlan). Therefore, even if production of the tax returns may involve a slight threat of prosecution, this danger is

outweighed by the legitimate, non-prosecutorial interest of the government in protecting the fisc. The court below was therefore correct in concluding that the petitioners were not entitled to a Fifth Amendment defense in this case.

c. For reasons set forth above, the privilege against self-incrimination is not available to petitioners here.[3] Furthermore, the Fifth Amendment should not protect a nonownership possessory interest acquired during a tax investigation for no other purpose than to achieve an ostensible right to assert the privilege.

It is established that an accountant may be compelled to produce his work papers and other records used in preparing his clients' tax returns. *E.g.*, *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5). Furthermore, taxpayers may not intervene in enforcement proceedings held to require such production. *Donaldson* v. *United States*, 400 U.S. 517. However; petitioners here contend (Pet. 7-8) that taxpayers, by having their accountant transfer his rec-

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[3] Although the Fifth Amendment claim in this case is similar to that raised in *Couch* v. *United States*, No. 71-889, certiorari granted, April 3, 1972, that case involves not just previous returns but books, records, and papers used in preparing returns and in it the record does not establish that "the Intelligence Division of the Internal Revenue Service has dropped that portion of the investigation concerned with possible criminal behavior" (Pet. App. A, 20). Furthermore, in *Couch* the records concedly were the property of the taxpayer; here, the papers in question have been found to be the property of a third person (Pet. 24). Therefore, it is submitted that the Court need not hold this case for disposition of *Couch*.

ords to them during a tax investigation and then asserting the Fifth Amendment, may defeat an Internal Revenue Service summons through anticipatory self-help. The courts below properly rejected this claim.

In a case involving almost identical facts, the Seventh Circuit categorized the transfer of papers as "a mere attempt to thwart the government investigation," found that the taxpayer's possession therefore was not rightful, and held that the taxpayer acquired no privilege from his possession. *United States* v. *Zakutansky*, 401 F. 2d 68, 72, certiorari denied, 393 U.S. 1021. An assertion of privilege by taxpayers in similar circumstances was also rejected in *Deck* v. *United States*, 339 F. 2d 739 (C.A. D.C.), certiorari denied, 379 U.S. 967.[4] Petitioners rely (Pet. 7) upon a conflict with *United States* v. *Cohen*, 388 F. 2d 464 (C.A. 9), which involved recognition of a Fifth Amendment privilege where an accountant's work papers, correspondence, and other documents were transferred to the taxpayer during a criminal tax investigation. The decision in *Cohen* has not been followed elsewhere and its reasoning has been rejected as unpersuasive. See *United States* v. *Egenberg*, 443 F. 2d 512, 518 (C.A. 3). No sufficient reason appears for reviewing this conflict with a single case, especially since the decision below is sustainable on the entirely separate grounds discussed above.

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[4] Assertion by taxpayers of a privilege against self-incrimination was also rejected in *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8), where the taxpayers' attorney had acquired possession of work papers and records.

2. Petitioners further contend (Pet. 11-12) that enforcement of the summons should have been denied because the government allegedly failed to meet its burden of proof, arguing that the district court failed to make findings "on whether all of the required administrative steps in connection with the issuance of a summons had been followed and on whether the original of the desired returns was in the Government's possession" (Pet. 11).[5] Petitioners here are mistaken as to both the law and the facts. "The burden of showing an abuse of the court's process is on the taxpayer * * *." *United States* v. *Powell*, 379 U.S. 48, 58. Petitioners failed to meet this burden; although revenue agents testified in the district court (R. 61-93), petitioners' attorney did not question them concerning any alleged failure to take the "required administrative steps." Furthermore, the district court did quite clearly find that "[t]he Government no longer has in its possession copies of the [petitioners'] income tax returns for the years 1949 through 1959, inclusive" (Pet. 25). This finding was adequately supported by the evidence (R. 69).

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[5] Petitioners also contend (Pet. 8-10) that the decision should be reviewed because "the Court of Appeals made several pronouncements which are in conflict with established principles applicable to summons enforcement cases" (Pet. 8). However, petitioners do not establish the existence of any such conflict and it is submitted here that there is none. In any event, review would not be warranted on the basis of such *obiter dicta*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
JOHN M. BRANT,
Attorneys.

APRIL 1972.

APPENDIX

Constitution of the United States:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be revelant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer

or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

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REPLY BRIEF

JOHN J. RAYMOND
JOSEPH F. DILLON
1400 Guardian Building
Detroit, Michigan 48226
Counsel for Petitioners.

Of Counsel:
RAYMOND, FLETCHER & DILLON

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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